

YOGANANTHY AS THAMBAIYA

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v.

IDRIS OSMAN

HIGH COURT MALAYA, JOHOR BAHRU

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ABDUL MALIK ISHAK J

[CIVIL SUIT NO: 22-160-1995]

2 APRIL 1996

CIVIL PROCEDURE: Affidavit - Service - Whether affidavit filed out of time could be remedied - Whether service by facsimile valid - Rules of the High Court 1980, O. 32 r. 13(2)(b), O. 62 r. 6(1), O. 65 r. 6(2) - Interpretation

c

CIVIL PROCEDURE: Injunction - Balance of convenience - Whether plaintiff would be adequately compensated if she succeeded at trial - Guidelines - Whether applicable

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CIVIL PROCEDURE: Injunction - Damages - Whether defendant would be adequately compensated by plaintiff's undertaking as to damages

This was an application in encl. 17 ('encl 17') by the plaintiff for an interim injunction to refrain the defendant from certain acts pertaining to the remaining shares belonging to the defendant in JB Securities Sdn Bhd ('the Company'). The plaintiff had earlier filed a summons against the defendant and had subsequently sought summary judgment and specific performance under O. 81 of the Rules of the High Court ('the RHC').

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The plaintiff alleged that for a consideration of RM500,000 the defendant had signed a statutory declaration where he deposed that he would transfer 51% of the shares of the Company to the plaintiff. However the defendant in breach of his statutory declaration, entered into an agreement with third parties to issue 11,800,000 shares. Thus the plaintiff sought to restrain the defendant from disposing his remaining 4% of the shares in the Company.

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At the hearing of the application the defendant raised a preliminary objection against the use of encl. 19 ('encl 19') in deliberating encl. 17, as it was filed out of time. The plaintiff contended that encl. 19 was faxed to the defendant, although without the exhibits, within time and in any event the defendant would not be prejudiced even if it was taken into consideration by the court as the delay was by a mere two days. This was vigorously objected to by the defendant and the plaintiff then asked for an adjournment to enable him to file an application for abridgement of time to file encl. 19 under O. 3 r. 5(1) of the Rules of the High Court 1980 ('the RHC').

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- a* The issues before the court were: (i) whether adjournment could be granted to remedy non-compliance with procedural rules; (ii) whether there is good service when documents are served by facsimile machine; (iii) what criteria to consider before granting an interim injunction; (iv) whether an award of damages would be an adequate compensation for the plaintiff; and (v) whether
- b* an injunction if granted would be prejudicial to the defendant.

Held:

- c* [1] The court's power to extend time can never be used as an easy escape route for those who did not conduct their client's cases with reasonable expedition. Notwithstanding the very wide powers given to the court to remedy the non-compliance with the rules, the court ought not to exercise its discretion to remedy it where the failure or non-compliance with the rules was so fundamental or serious. What amounts to a fundamental or serious breach must be dependent on the facts of each case. In the instant case, encl. 19 should be disregarded as it contravened
- d* O. 32 r. 13(2)(b) of the RHC, and consequently, to allow an adjournment to enable the plaintiff to file an application to abridge time in order to file encl. 19 would make a mockery of the rules in that it would allow the plaintiff to take advantage of his breach to his benefit.
- e* [2] Order 62 r. 6(1) of the RHC contains provisions as to when ordinary service may be effected. This rule does not relate to documents which are required to be served personally. Order 65 r. 6(2) of the RHC contains provisions as to what is the proper address of any person on whom a document is to be served. This order has to be read as a whole
- f* and it specifies the methods of ordinary service which can be used. Thus the effect of the rule is that either service has to be in accordance with one of the three methods specified in O. 65 r. 6(1) or by way of personal service as set out in O. 62 r. 3 of the RHC or in accordance with a statute.
- g* [2a] There has been no expert evidence before the court as to the process which results in a document, like an affidavit, being transmitted by fax. But it is clear that subject to the quality of the paper being used and the type being of acceptable durability, the results produced by the use of fax can be perfectly satisfactory. What is required and is of utmost
- h* importance is that a legible and a complete copy of the document should be in the possession of the recipient and if that be the situation there would be good service. In the case before the court, the paper that was used in faxing encl. 19 was of the required durability but it was

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incomplete and without the relevant exhibits when it was received by the defendant and which was in complete variance with the actual encl. 19. Therefore the service of encl. 19 by fax was not good service.

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- [3] The position in law is that the court needs to be satisfied that the claim is not frivolous or vexatious. There is no longer a need for the *prima facie* case test, ie, as long as the court is satisfied that there is serious question to be tried, that will constitute a basis to proceed to consider whether on the balance of convenience the injunction should be granted.

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- [3] In scrutinising the affidavits of both parties and the documents of the plaintiff, in particular the statutory declaration and the loan agreement it was found that there was a serious question to be tried. The plaintiff if she succeeded at the trial would not be adequately compensated by damages for any loss caused by the refusal to grant the interlocutory relief as the company had been sold to a third party. The defendant would also not be adequately compensated under the plaintiff's undertaking as to damages as there was a failure to show that the plaintiff was worth the RM80 million that she claimed was the measure of the damages incurred by her. The plaintiff had come to court with unclean hands there being material non-disclosures of facts. Consequently, the guidelines on the balance of convenience could not be applied as the interlocutory order had the practical effect of adjudicating on the parties' rights without trial. Thus the best endeavour to avoid injustice would be to refuse the prayers sought for in encl. 17.

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[Plaintiff's application for injunction dismissed.]

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Cases referred to:

Associated Tractors Sdn Bhd v. Chan Boon Heng & Anor [1989] 2 CLJ 1197 (*refd*)

American Cyanamid v. Ethicon Ltd [1975] AC 396 (*refd*)

Bagley v. Bagley 206 Ala 232 (*cit*)

Bernstein v. Jackson [1982] 1 WLR 1082 (*cit*)

Bestobell Paints v. Bigg [1975] FSR 421 (*cit*)

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Birmingham v. Sheridan 33 Beav 660 (*cit*)

Bishun Prashad Pathak & Ors v. Sashi Bhusan Misra & Ors [1923] PATNA 133 (*refd*)

Burgin v. Sugg 204 Ala 270 (*refd*)

Cayne v. Global National Resources [1984] 1 All ER 225 (*cit*)

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- a* Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors [1989] 1 CLJ 157 (refd)
 Ellis v. Small 209 Mass 147 (refd)
 Fry v. Lane [1888] 40 Ch D 312 (cit)
 Hanking v. Anderson 34 W Va 709 (cit)
 Haribat v. Kantzler 112 Ill 482 (cit)
- b* How v. Weldon [1754] 2 Ves-Sen 516 (cit)
 Imprint (Print and Design) Ltd v. Inkblot Studios Ltd (The Times 23 February 1985) (refd)
 KS Chua & Co v. Chui Miang Chew & 5 Others [1996] 2 CLJ 676 (refd)
 Kuah Kok Kim v. Chung Lee Leong Seng Co (Pte) Ltd [1991] 2 CLJ 1634 (refd)
- c* Lewis v. Bond 18 Beav 85 (cit)
 Musgrove v. Hodge 46 Kan 764 (cit)
 Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1984] 1 CLJ 57 (refd)
 Office Overload Ltd v. Gunn [1977] FSR 39 (cit)
 Paul v. Constance [1977] 1 All ER 195 (cit)
- d* Public Finance Bhd v. Lee Bee Rubber Factory Sdn Bhd & Ors [1994] 2 CLJ 646 (cit)
 Punca Klasik Sdn Bhd v. Seok Kim Leow [1996] 4 CLJ 399 (refd)
 Re Lord Cable; Garret v. Waters [1976] 3 All ER 417 (foll)
 Roxy Electric Industries (M) Bhd v. Syarikat Nominee Bumiputra Sdn Bhd [1989] 2 CLJ 657 (cit)
- e* Sharpley v. Manby [1942] 1 KB 217 (refd)
 Smith v. Kay [1859] 7 HLC 750 (refd)
 Smith v. Secretary of State for the Environment (Times, 6 July 1989) (refd)
 Stylo Shoes Ltd v. Prices Tailors Ltd [1960] Ch 396 (refd)
 Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar v. Dato' James Ling Beng King [1989] 2 CLJ 244 (refd)
- f* Witchita Water Co v. Witchita 280 Fed 770 (refd)

Legislation reffered to:

Evidence Act 1950, s. 92
 Rules of the High Court 1980, O. 3 r. 5(1), O. 32 r. 13(2)(b), O. 62 rr. 3, 6(1), (2), O. 63 r. 1, O. 65 rr. 6(1), (2), (3), (6), O. 81

- g* For the plaintiff - Leong Yue Khau (Magdalene & Wong Sum Yoke with him); M/s Riza Leong & Partners
 For the defendant - PK Nathan; M/s Nathan & Yang

Reported by Michele Saw

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JUDGMENT**Abdul Malik Ishak J:**

This was an application by the plaintiff by way of a summons in chambers in encl. 17 wherein the plaintiff sought for the following prayers:

- (i) that the defendant, his agents, servants, employees, nominees or howsoever otherwise be restrained until further order from dealing entering into or finalising or completing any agreement, executing any agreement, formalising any agreement, exercising any rights and obligations under any agreement or to do any such acts whatsoever and howsoever otherwise except to recognise the plaintiff's rights in the shares of JB Securities Sdn Bhd held and/or registered in the defendant or its nominees' names;
- (ii) in the alternative, the defendant, his agents, servants, employees, nominees or howsoever otherwise be restrained until further order from using, spending and/or utilisation any sums from the proceeds of sale of the defendant's shares in JB Securities Sdn Bhd pursuant to the Sale Agreement dated 6 September 1994 or any other agreement;
- (iii) that the costs of this application be costs in the cause; and
- (iv) such further and/or other relief that this Honourable Court may deem fit to grant.

To put in a nutshell encl. 17 was in the nature of an injunction. It is a judicial remedy where the plaintiff sought to refrain the defendant from doing or do a particular act or thing. At the outset, Mr. P.K. Nathan raised a preliminary objection on behalf of the defendant. It was his submission that the affidavit of the plaintiff affirmed on 16 March 1996 as reflected in encl. 19 should not be considered by this court in deliberating encl. 17. It was the plank of his submission that encl. 19 was filed out of time. It transpired that encl. 19 was filed in response to the affidavit in reply filed by the defendant which was affirmed on 28 February 1996 and marked as encl. 18. Mr. Leong Yue Khau for the plaintiff magnanimously agreed that his Kuala Lumpur law firm received encl. 18 by courier on 1 March 1996, whilst his Johor Bahru law firm received by fax a copy of encl. 18 on 28 February 1996. Miss Magdalene Wong Sum Yoke for the plaintiff also confirmed that her Johor law firm received the original copy of encl. 18 on 29 February 1996. Mr. Leong Yue Khau agreed that there was a delay of two (2) days in filing encl. 19 when the last date for filing encl. 19 was to be regarded as on 14 March 1996. However, by way of an alternative Mr. Leong Yue Khau strenuously submitted

- a* that he had faxed encl. 19 without the exhibits to Mr. P.K. Nathan on 14 March 1996 and, consequently, he argued that he was within time. Mr. P.K. Nathan took exception and he showed to this court the draft faxed copies of encl. 19 which were incomplete and at variance with the actual encl. 19. I have said in *K.S. Chua & Co v. Chui Miang Chew & 5 Others* [1995] 3 AMR: 2605 especially at p. 2611:
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- c* Now, reverting back to O. 32 r. 13(2)(b) of the RHC which came by way of an amendment vide (PU(A) 193/93) where it imposes on a party wishing to reply to an affidavit served on him, a mandatory obligation to file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him unless provided by the rules. This onerous obligation is also placed on the applicant who files affidavit in support of his application to file and serve on the other party within 14 days from the date of the filing of the said application (see O. 32 r. 13(2)(a) of the RHC). Thus, under this new O. 32 r. 13(2) of the RHC a strict time-table has been set by the Rules Committee and my impression of it is that it is draconian
- d* as it does not give much room space to manoeuvre for the applicant to file a further affidavit in support of his application after 14 days from the date of filing of the application.

- I too have said in an unreported decision in the case of *Punca Klasik Sdn Bhd v. Seok Kim Leow*, Civil Suit No: 22-385-1994 to the effect that:
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- f* The first principle is the time honoured principle that the rules of court and the associated rules of practice devised by the Rules Committee and developed by the courts over the years to promote the expeditious despatch of litigation must be rigidly observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but rather requirements set which should be met rigidly by the parties thereto.

- Mr. Leong Yue Khau sensing trouble, quickly changed his stand and applied for an adjournment to enable him to file an application for abridgement of time to file encl. 19 under O. 3 r. 5(1) of the Rules of the High Court 1980 ('RHC'). This was met by a vigorous objection from Mr. P.K. Nathan who argued that it was a waste of judicial time for the court to dwell on the plaintiff's application for an adjournment. Mr. P.K. Nathan drew my attention to several enclosures in the court file to drive home the message that an adjournment at this juncture would not help the plaintiff in any way whatsoever. Mr. P.K. Nathan ingeniously argued that:
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- i* (1) the writ of summons indorsed with a statement of claim in encl. 2 especially at para. 6 showed that the defendant had disposed off the shares to a third party, yet the plaintiff had the audacity to pray, by way of an alternative prayer, for a specific performance of the sale agreement dated 8 February 1988; if at all, it was the defendant's submission that the plaintiff was only entitled to damages.

- (2) the affidavit of the plaintiff affirmed on 12 February 1996 in encl. 16 in support of encl. 17 adverted to the statement of claim and by the same token, a similar conclusion would be arrived at just like para. (1). a
- (3) the first prayer in encl. 17 as set out in the early part of this judgment was said to be impossible for this court to grant as the shares had been sold to a third party. b
- (4) the alternative prayer in encl. 17 which was also set out in the early part of this judgment made reference to an agreement dated 6 September 1994 which clearly cut across the grain of the plaintiff's case as adverted in the statement of claim where the agreement was said to be dated 8 February 1988. c
- (5) the writ of summons with an indorsed statement of claim was filed on 30 June 1995 while encl. 17 was filed on 15 February 1996. There was a delay of 7 months 15 days before the plaintiff proceeded to file encl. 17. Seen in this perspective and when viewed with the fact that the subject matter has since dissipated, the delay in filing encl. 17 was indeed excessive. d

In rebuttal Mr. Leong Yue Khau argued that the plaintiff's claim pivoted on the concept of a beneficiary under a trust. The plaintiff was said to be a beneficiary while the defendant was the trustee and, in the context of that relationship, the defendant was said to be acting contrary to and in breach of that trust. It was argued that though the shares had been disposed off nevertheless it may not have been sold and, in the circumstances, the plaintiff may still have a chance of preventing the shares from being dissipated. Finally, Mr. Leong Yue Khau argued, quite pathetically, that encl. 19 should be allowed to remain as part and parcel of the affidavit for this court to rely upon when adjudicating encl. 17. It was his submission that the defendant would not be prejudiced in the event encl. 19 was taken into consideration by this court. The delay was by a mere two (2) days and Mr. Leong Yue Khau submitted that the defendant must have been afraid to reply to encl. 19 and that was why he objected to its admission. Order 3 r. 5(1) of the RHC was called in aid by the plaintiff in an attempt to convince this court that encl. 19 should be received in evidence. I beg to disagree. I must at once put a caveat that the Court's power to extend time, if there was an application of that nature which unfortunately there wasn't any, can never be used as "an easy escape route for those who did not conduct their client's cases with reasonable expedition" (per May LJ in *Smith v. Secretary of State for the Environment* (reported in the Times, 6 July 1987). With reasonable diligence the plaintiff could have prepared encl. 19 expeditiously through her solicitors and avoid the pitfalls of O. 32 r. 13(2)(b) of the RHC. Mr. P.K. Nathan rightly

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- a* submitted that he was entitled to raise a procedural point for the defendant. The Singapore Court of Appeal in *Kuah Kok Kim v. Chung Lee Leong Seng Co. (Pte) Ltd* [1991] 2 MLJ 129 held the view that notwithstanding the very wide powers given to the court to remedy the non-compliance with the rules, the court ought not to exercise its discretion to remedy it where the failure
- b* or non-compliance with the rules was so fundamental or serious. Thus, for example the failure of the party to renew the writ within the time specified in the rules was such a fundamental defect in the proceedings that it was held that it was not a proper case for the exercise of the discretion: *Bernstein v. Jackson* [1982] 1 WLR 1082. At the end of the day, what amounts to a
- c* fundamental or serious breach must be dependant on the facts of each case. In my judgment, encl. 19 should be disregarded as it contravened O. 32 r. 13(2)(b) of the RHC and, consequently, to allow an adjournment to enable the plaintiff to file an application to abridge time in order to file encl. 19 would make a mockery of the rules in that it would allow the plaintiff to take
- d* advantage of his breach to his benefit. This court would not be idle and let the plaintiff defeat the very purpose and object of O. 32 r. 13(2)(b) of the RHC.

- Be that as it may, an interesting point of law arose in regard to the method of service of an affidavit. A copy of the affidavit in reply in encl. 18 was
- e* faxed to the law firm of Mr. Leong Yue Khau in Johor Bahru on 28 February 1996. Even Miss Magdalene Wong Sum Yoke for the plaintiff also confirmed that her Johor Bahru law firm received encl. 18 on 29 February 1996. Mr. P.K. Nathan received the incomplete draft faxed copy of the affidavit in encl. 19 without the exhibits on 14 March 1996 which was said to be different from
- f* the actual version in encl. 19. Now, the pertinent question to ask would be this: Would the parties be allowed to employ transmission of encls. 18 and 19 by facsimile machines as an effective means of service? Order 62 r. 6(1) of the RHC contains provisions as to when ordinary service may be effected and it is worded thus:

- g* Service of any document, not being a document which by virtue of any provision of these rules is required to be served personally, may be effected:

(a) by leaving the document at the proper address of the person to be served;
or

- h* (b) by prepaid registered post; or

(c) in such other manner as the court may direct.

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This rule does not relate to documents which are required to be served personally. There is a certain degree of formality for service of any document under this rule. The words “any document” must include affidavits like encls. 18 and 19. Order 65 r. 6(2) of the RHC contains provisions as to what is the proper address of any person on whom a document is to be served. Order 65 r. 6(3) of the RHC makes it clear that nothing in the rule is to prohibit the personal service of any document or affect any written law which provides for the manner in which documents may be served on a body corporate. In my judgment, O. 65 r. 6 of the RHC has to be read as a whole and that although O. 65 r. 6(1) of the RHC uses the word “may”, the rule specifies the method of ordinary service which can be used; the effect of the rule being that either service has to be in accordance with one of the three methods specified in O. 65 r. 6(1) of the RHC or by way of personal service as set out in O. 62 r. 3 of the RHC or in accordance with a statute. But one must not forget that the parties may agree to different means of service as Parker LJ had occasion to say in the case of *Imprint (Print and Design) Ltd v. Inkblot Studios Ltd.*, The Times, 23 February 1985, Court of Appeal (Civil Division) Transcript No: 35 of 1985 to the effect “that it is possible for parties to agree to accept service of a document outside the provisions of the rules.” Order 62 r. 6(1) of the RHC has to be read subject to the express exception for personal service under O. 62 r. 3 of the RHC, and subject to the agreement of the parties. For my part, I can find no justification for departing from the normal meaning of the provisions of O. 62 r. 6(1) of the RHC to achieve this result. It is obvious that the purpose of O. 62 r. 6 of the RHC is not to restrict methods of service but to assist the parties to achieve service and, if necessary, to prove that that service has taken place in the specified circumstances mentioned therein. In *Sharpley v. Manby* [1942] 1 KB 217 and in *Stylo Shoes Ltd v. Prices Tailors Ltd* [1960] Ch. 396, a statute specified a method of service which “may” be used and the courts there refused to regard the methods specified in the statute as being exhaustive and instead regarded them as permissive. Although there is a danger in seeking to apply decisions on specific statutory provisions to different situations, yet those authorities can be used as useful guidelines. Having said all these, I now address my mind as to whether a document like an affidavit which is transmitted by facsimile (“fax”) can be regarded as having been served? I must lay stress that there is no expert evidence before this court as to the process which results in a document, like an affidavit, being transmitted by fax. But one thing is clear and that is that subject to the quality of the paper being used and the type being of acceptable durability, the results produced by the use of fax can be perfectly satisfactory. It is of considerable convenience to solicitors practising

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a in different towns to rely on their fax machines. What is the point, if I may ask, of installing fax machines and advertising its fax numbers, if practising solicitors cannot rely on their fax machines to transmit documents? However, I would like to add a caveat in that this judgment do not apply to writs and other documents used for initiating legal proceedings. Thus, apart from that class of documents, I must confess that I cannot see any legal reasons as to why advantage should not be taken of the progress in technology that is felt in the country of which a facsimile machine represents a sample of that techonological progress. In other words, out of town solicitors should take advantage of the progress in technology which a facsimile machine represents to enable documents to be served by fax.

c It is my judgment that the purpose of serving a document as laid down by the Rules Committee is simply to ensure that its contents are available to the recipient and whether that document is served by personal service or by fax the net result is the same – the recipient will receive the message and be made aware of its contents. I am aware that what is transmitted through the facsimile machine is not the document but rather an electronic message. One must be able to distinguish between the method of transmission and the result of the transmission by fax. The recipient's facsimile machine will receive the message from the sender using the recipient's paper and that message will be the document which the sender intended should be served. I do not think that sending a document by fax lacks the necessary degree of formality for service of a document in a legal proceeding. What is required and is of utmost importance is that a legible and a complete copy of the document should be in the possession of the recipient; and if that be the situation there was indeed a good service.

f A generous interpretation of O. 62 r. 6(1) of the RHC must be placed on it thereby enabling the mere production of a document by the recipient's facsimile machine to be evidence that service was made at the proper address of the person to be served. However, the document that comes out from the recipient's facsimile machine must be on paper of durable quality and of appropriate size as envisaged under O. 63 r. 1 of the RHC unless the nature of the document renders it impracticable. In so far as the paper that was used in faxing encl. 19, I am satisfied from what was shown to me by Mr. P.K. Nathan that the paper that was used was of the required durability or permanence. Unfortunately, since encl. 19 was incomplete and without the relevant exhibits when it was received by Mr. P.K. Nathan and in complete variance with the actual encl. 19, I had no choice but to rule that the service of encl. 19 by fax was not a good service. The position was not the same in regard to encl. 18. The faxed copy of encl. 18 that was received by Mr. Leong

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Yue Khau on 28 February 1996 must have been of good quality and durability since there was no complaint to the contrary. To strengthen the position of the defendant, the original version of encl. 18 was received by Miss Magdalene Wong Sum Yoke for the plaintiff on 29 February 1996 – consequently, I ruled and it was my judgment that encl. 18 was rightly served on the plaintiff.

Reverting back to encl. 17, the plaintiff affirmed an affidavit dated 12 February 1996 in encl. 16 and there she deposed that R & I Securities Sdn Bhd now known as JB Securities Sdn Bhd ('the company') and at the relevant time a stock broking company was suspended from trading in the stock market by the Kuala Lumpur Stock Exchange sometime in July 1976. On or about February 1979 UMBC bank appointed receivers to manage the affairs of the company as the company was having financial problems. A sum of RM500,000 was said to be needed to revive the company. The plaintiff's husband who was then employed as an accountant in the accounting firm of Hanafiah Raslan & Mohamed approached the plaintiff sometime in July 1987 in order to convince the plaintiff to loan the money to the defendant for the purpose of reviving the company. The defendant was said to be unable to raise any loan during this period as the company was under receivership. The plaintiff was initially sceptical in providing the loan to the defendant but when the defendant agreed to transfer 55% of the shares in the company to the plaintiff as consideration for the plaintiff's help in re-organisation of the company, the plaintiff became interested and was willing to take the risk and agreed to loan him the money. At the request of the plaintiff, a Statutory Declaration was signed by the defendant before a Commissioner for Oaths on 12 August 1987 and for convenience that Statutory Declaration is reproduced hereunder:

STATUTORY DECLARATION

I, IDRIS BIN OSMAN, I/C No: 2649623 of 155, Jalan Beringin, Melodies Garden, Johor Bahru, do solemnly and sincerely declare that:

- 1) I am the legal owner of 100% of the equity capital of R & I SECURITIES SDN. with its registered office at Suite 7-1A, Kompleks Tun Abdul Razak, Jalan Wong Ah Fook, Johor Bahru and hereby undertake to transfer 55% of the equity capital to YOGANANTHY A/P A.S. THAMBAIYA, I/C No: 5629441 of No. 4, Jalan Bulat, Century Garden, 80250 Johor Bahru.
- 2) I am transferring the said 55% of the equity capital in R & I SECURITIES SDN. to YOGANANTHY A/P A.S. THAMBAIYA in consideration for her help in proposing the reorganisation scheme and putting forth the required collateral and cash as deemed necessary by the bankers for the revival and reactivation of the stockbroking business of R & I SECURITIES SDN.

- a* 3) I shall hold in trust the share certificates for the said 55% of the equity capital of R & I SECURITIES SDN. belonging to YOGANANTHY A/P A.S. THAMBAIYA for the benefit of her or her nominees until such time as the conditions for the holding of equity in the stockbroking company as required by the Kuala Lumpur Stock Exchange is satisfied by her or her nominees.
- b* 4) I shall endeavour to purchase or dispose off the said equity or a portion to a qualified person if for any reason the above mentioned equity or a portion cannot be transferred upon the requisite conditions being satisfied and the proceeds so received shall be given to the beneficiary of the equity holder.
- c* 5) I will undertake to employ YOGANANTHY A/P A.S. THAMBAIYA as a DEALERS ASSISTANT OR EXECUTIVE in the stockbroking company, R & I SECURITIES SDN. upon its resumption of the company's business operations and endeavour to train her or (her) nominees as deemed necessary.
- d* 6) I will endeavour to make every possible approach to the Committee of the Kuala Lumpur Stock Exchange and Registrar of Companies to enable the beneficiary of the 55% equity holder, YOGANANTHY A/P A.S. THAMBAIYA or her nominees to obtain membership of the Kuala Lumpur Stock Exchange and secure the Dealer's licence in accordance to the SECURITIES INDUSTRY ACT, 1973 upon her or her nominees obtaining more than a year experience as a Dealer's Assistant or Executive in the stockbroking company.
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And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declaration Act 1960.

f Subscribed and solemnly)
declared by the above)
named Encik Idris bin)
Osman I/C no: 2649623) Sgd
at Johor Bahru in the)
g presence of P.S. Naidu)
this 12th day of August)
1987.)

Before me,

h Sgd
P.S. NAIDU
Commissioner of Oaths,
Johor Bahru.

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On the strength of the statutory declaration, the plaintiff had on 8 February 1988 advanced a loan of RM500,000 to the defendant. It was also agreed that Brilliant Light Enterprise Sdn Bhd was to absorb part of the company's debts. The loan agreement containing the above salient terms were duly prepared and signed by the defendant, the company and the plaintiff on 8 February 1988. The loan agreement was exhibited as exh. 'Y2' and, *inter alia*, it stipulated that:

- (i) the loan given shall be assumed to be the contribution for the rights issue; and
- (ii) after the rights issue, shares amounting to 3,200,000 will be distributed and from that amount the plaintiff shall be entitled to 55% of the defendant's equity in the company.

As an additional precaution, the plaintiff requested the defendant to grant a Power of Attorney to the plaintiff's husband. The defendant duly obliged and that Power of Attorney was duly exhibited and marked as exh. 'Y3'. The plaintiff deposed further in her affidavit that on 18 June 1991, the defendant together with another shareholder by the name of Encik Isa bin Mustapha, and the company entered into a written agreement with one Koh Pee Seng and Mohamed Salleh Ban Jun (hereinafter referred to as "the third parties") to, *inter alia*, issue a further 11,800,000 shares to the third parties. It was deposed that though the defendant was holding the shares on trust for the plaintiff yet the defendant waived the right to subscribe for the new issued shares and out of that deal the defendant was paid a sum of about RM3,776,000. From that sum, it was deposed that the defendant had repaid RM500,000 to the plaintiff. It was deposed that as a further consideration of the defendant's waiver of the subscription of 11,800,000 shares, the defendant was given a further interest free loan of about RM2,517,334 by the third parties and this was said to be embodied in the subscription agreement which was exhibited and marked as "Y4". It was deposed that the defendant had utilised the aforesaid interest free loan to purchase another block of 1,066,600 shares in the company and that the aforesaid interest free loan had been paid from the dividends of the company. Consequently, from these set of facts it was deposed that the defendant had acted in breach of his fiduciary duties as a trustee in that he had failed to transfer the portion of the shares in the plaintiff's name as agreed. Since the defendant had not transferred 55% of the shares in the company to the plaintiff, the plaintiff had no choice but to instruct her husband to meet the defendant and demand compliance with the written documents. It was deposed that the plaintiff's husband had exhausted all avenues to discuss the matter of the transfer of 55% shares of the company to the plaintiff's name or to her nominees. The plaintiff deposed that she proceeded to consult her solicitors who advised her that on the strength of the documents as exhibited

- a* in encl. 16, she had a good case to commence a civil suit against the defendant and also to obtain summary judgment thereof. The plaintiff deposed that there was no defence available to the defendant and she prayed for summary judgment including an order for specific performance under O. 81 of the RHC. Incidentally, it is pertinent to mention that O. 81 of the RHC was not prayed for in encl. 17. The plaintiff explained the delay in filing her application in encl. 17 in that she had to locate the documents that had been exhibited in encl. 16 to which she was not a party thereto and this exercise entailed time. The plaintiff further deposed that she had to solicit assistance from friends to locate and obtain those documents. The plaintiff proceeded to depose that she suffered loss and damage including substantial sums and was further put to considerable hardship and inconvenience. The plaintiff was bold enough to estimate the damage incurred by her to the tune of approximately RM80 million.
- b*
- c*
- d* It was deposed that the defendant was now left with approximately 4% of the shares in the company and that the defendant was about to dispose off those shares in breach of his duties as a trustee to the detriment of the plaintiff. The plaintiff deposed that if the defendant was not prevented by a court order he would proceed to dispose of the remaining 4% of the shares in the company leaving the plaintiff high and dry without any legal redress. The plaintiff
- e* deposed that the defendant was about to execute an agreement for the disposal of the remaining 4% shares in the company with a purchaser for a consideration of approximately RM10 million. For these reasons, the plaintiff deposed that the interim injunction restraining the defendant or his agents from dealing with the 4% shares in the company and/or from using the proceeds of the sale of the defendant's 4% shares in the company be granted. It was
- f* said that on the balance of convenience and to maintain the *status quo* of the parties, the injunction should be granted by the court. Finally, the plaintiff deposed that she was able to provide the required undertaking as to damages.
- g* The defendant affirmed an affidavit in reply in encl. 18 on 28 February 1996 and he categorically stated that the plaintiff had no knowledge of the transactions and the facts as deposed by the plaintiff in encl. 16 because the defendant dealt directly with the plaintiff's husband by the name of Bala Krishnan Ponniah ('Bala'). The defendant deposed that he did not at any point of time discuss business or company matters with the plaintiff. The defendant
- h* deposed that the company was an unlimited company which stopped trading when one partner and director passed away in 1976. When a receiver was appointed by UMBC Berhad pursuant to a debenture in its favour, the company's debts were in excess of RM1.2 million in addition to a contingent liability of about RM2.5 million – thus a sum of RM500,000 could not revive
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the company in 1987 as the debts had escalated to well over RM4.5 million. Sometime in 1986 to 1987, the defendant discussed with Bala who was, at that time, acting on behalf of the receiver for the company. In that discussion, Bala mooted the idea of the possibility of compromising with the creditor banks to revive the company. Bala was discussing in his capacity as the receiver's agent and, at all material times, there was no mention of Bala's intention to be the financier. When the creditor banks agreed to the compromise scheme, Bala became interested in financing the revival of the company. Meanwhile, the defendant managed to renew the company's membership with the Kuala Lumpur Stock Exchange ('KLSE') every year after the company stopped trading in 1976. Several discussions took place between the parties and Bala was particularly concerned about the contingent liabilities. The defendant explained to Bala that a sum of RM500,000. was needed for trading purposes once the company's debts were taken care of. Bala agreed to finance the company provided the defendant agreed to give Bala 50% of the profits. It was deposed that sometime in 1987, Bala brought some documents to the defendant's house which included the Statutory Declaration for signatures. Some months later in 1988, Bala took the defendant to the premises of the public accountants by the name of Hanafiah Raslan & Mohamed (now known as Arthur Andersen & Co.) to sign the financing agreement. On the way there Bala told the defendant that the plaintiff would sign as financier on his behalf as it was not appropriate for Bala to sign in his capacity as the receiver's agent. Bala then promised the defendant a copy of those documents after they were stamped and finalised but unfortunately this only materialised in late 1989 or 1990. Though the plaintiff promised to advance RM500,000, yet the money was not forthcoming. After some measure of delay, Bala made available a sum of RM250,000 for trading purposes. The company resumed business in 1989. It was deposed that the plaintiff did not advance any money to the defendant.

It was deposed by the defendant that the company was struggling to survive with a trading capital of RM250,000. Bala was unable to inject more money into the company and neither was he able to arrange for collateral security as promised. It was at this juncture that the relationship between Bala and the defendant became strained. Bala insisted that the company be sold as a going concern. A letter from Bala dated 2 October 1989 was exhibited and marked as exh. "IDRIS 1" and that letter clearly showed the major role played by Bala in relation to the company. Brilliant Light Enterprise Sdn Bhd defaulted in its payment to the creditor banks contrary to what Bala had promised. It was deposed that Bala, Isa bin Mustapha (a former partner of the defendant) and the defendant himself took extra pains in arranging for some prospective buyers for the company. Unfortunately, these prospective and potential buyers

- a* failed to measure up to the intricacies of the KLSE's regulations. Eventually the company was sold to Koh Pee Seng and Mohamed Salleh Bajuri (not Mohamed Salleh Ban Jun as deposed by the plaintiff in para. 10 of encl. 16). The proposed method of sale was agreed by the respective lawyers and Bala was fully informed and personally participated in the sale arrangements. It was
- b* deposed that Bala had custody of all the company's documents including the share certificates together with the sale documents. On completion of the sale, Bala pestered the defendant to give him 50% of the proceeds as financier. Towards this end, several meetings were held between Bala, the defendant's solicitors and the defendant. Finally, the parties agreed that the company made
- c* no profits and since Bala had assisted in reviving the company, the defendant felt obliged on moral grounds to share the proceeds of sale with Bala. Of pertinence, it was deposed that both parties agreed that the loan agreement dated 8 February 1988 was illegal and of no effect. After prolonged negotiations, the defendant finally agreed to give Bala 50% of the proceeds
- d* of sale of the company as full and final settlement for Bala's efforts and financial assistance at reviving the company.

- It was deposed that the total sale price was RM3,776,001 based on the premiums of the 11,800,00 shares allotted to the purchasers. The balance of 3,200,000 shares registered in the names of Isa bin Mustapha and the defendant
- e* remained as they were subject to an injunctive order by the Kuala Lumpur High Court vide civil suit no: D1-22-701-91 dated 21 May 1991 as reflected in exh. "IDRIS – 2(a)" of encl. 18. In due course, by an order of the Kuala Lumpur High Court in the same civil suit case number dated 10 December 1991 as shown in exh. "IDRIS – 2(b)" of encl. 18, the injunctive order was
- f* dissolved. Bala was adamant and he insisted that his share be paid in full in hard cold cash. This was accordingly done and Bala was paid 50% in cash. A cheque was duly made out in favour of the plaintiff as requested by Bala to the tune of RM3,556,000 on 2 March 1992. A photostat of that cheque and the payment voucher were exhibited as "IDRIS – 3(a)" and "IDRIS – 3(b)" respectively in encl. 18. Somehow by a miscalculation, Bala was
- g* overpaid by RM507,999.50 and the defendant sought for its return through the defendant's solicitors.

It was deposed that the plaintiff's claim was misconceived and untenable in law for the following reasons:

- h* (a) The loan agreement dated 8 February 1988 was said to be an illegal contract as the shares purported to be transferred to Bala or his nominees were Bumiputra shares in a Bumiputra company. It was in contravention of the KLSE rules as only members of the KLSE were entitled to hold such shares. It was said that since the plaintiff was not entitled to specific
- i* performance of her claim a *fortiori* she was also not entitled to the prayers sought by her in encl. 17.

(b) In any event, the contract was time barred and cannot be acted upon.

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(c) Bala had no authority to sign the agreement for R & I Securities Sdn Bhd.

(d) The plaintiff was only an agent or nominee of Bala and consequently, it was said that she could not bring this action in her name.

b

(e) The plaintiff failed to disclose that she had been paid RM3,556,000 which presented 50% of the proceeds of the shares of the company known as R & I Securities Sdn Bhd on 2 March 1992.

The defendant deposed that he was surprised that the plaintiff was claiming a share in JB Securities Sdn Bhd (the present trading name of R & I Securities Sdn Bhd) which was said to be completely unfounded and unsubstantiated. The same was true in regard to the plaintiff's claim of RM80 million. The defendant maintained that he had not offered for sale 4% share in JB Securities Sdn Bhd to anyone nor did he intend to sell them in the near future as he expected one of his two sons, presently studying in universities abroad, to be interested in becoming a stockbroker on his return. Finally, for these reasons the defendant prayed that the plaintiff's application in encl. 17 be dismissed with costs.

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I have purposely set out in extenso the contents of the affidavits of both parties so as to show the conflicts that exist therein. I would have thought that these conflicts warrant a trial and not the prayers sought for in encl. 17.

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Now, to the law. In *American Cyanamid v. Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504, the House of Lords stated that it was not necessary for the plaintiff to establish a *prima facie* case to succeed; it was sufficient that there was a serious issue to be tried. Their Lordships were of the view that the court should not embark on any sort of review of the evidence. This was what Lord Diplock said at p. 510:

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It is no part of the courts function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument or mature considerations. These are matters to be dealt with at the trial.

g

Briefly, the facts in the *American Cyanamid* case were that the plaintiff's there applied for an interim injunction to restrain the defendants from acts allegedly infringing their patent on a special sort of surgical stitch which would dissolve and be absorbed into the body. The Court of Appeal held that the plaintiffs had failed to show a *prima facie* case that the patent would be infringed and refused the application. The House of Lords unanimously reversed this decision

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- a* because, as stated above, they held that the appellants did not have to show a *prima facie* case that they would win the eventual trial of the action in order to be granted relief; they had merely to show that there was a serious question to be tried between themselves and the defendant (in the sense that his claim was not frivolous or vexatious). Once this was established the court had then
- b* to consider whether the balance of convenience lay in favour of granting or refusing interlocutory relief.

In my judgment, the correct approach would be for the court to consider the following questions:

- c* (1) Has the plaintiff shown a serious question to be tried?
- (2) If so, has the plaintiff shown that, if he is not granted an injunction at this stage, an award of damages at the trial will not be adequate compensation? Such an award of damages is not an adequate remedy if the harm suffered by the plaintiff is not financial loss (as an example
- d* claims for nuisance by noise) or, though financial in form, is not capable of precise calculation (as an example loss of profit in running a business). Damages are also known to be not an adequate remedy where, although the loss is capable of precise calculation, it is unlikely that the defendant would have the means to pay.
- e* (3) If both conditions are satisfied the court would then venture to look at the defendant's position and asks whether, if he eventually wins, damages will adequately compensate him for any loss he may suffer by reason of the injunction. If the answer is in the positive, the injunction should be granted.
- f* (4) If however, it appears that damages will not compensate him, the court should then compare the likely hardship to the plaintiff and defendant and see where the balance of convenience lies, that is, who is likely to suffer the greater hardship. If all else is equal the court should generally be inclined to lean in favour of preserving the *status quo* but it may at this stage be proper to take into account the relative strength of each party's
- g* case. Lord Diplock however emphasised in the *American Cyanamid* case that this "should be done only where it is apparent on the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either party's
- h* case.

An important point to note about the principles in the *American Cyanamid* case is that they provide that the court should not consider the likely prospects of success in the action in determining whether or not to grant interlocutory relief.

- i* One obvious advantage of the decision in the *American Cyanamid* is that it

relieves the court from the burden of considering the evidence and making a provisional assessment. In practice, however, it has been discovered that a rigid adherence to the *American Cyanamid* approach is capable of working injustice and, consequently, a number of authorities have since developed to show that a different approach should be adopted. Thus, in *Re Lord Cable; Garret v. Waters* [1976] 3 All ER 417; [1977] 1 WLR 7, the following principle emerges that if it is obvious from the very beginning that the plaintiff is unlikely to succeed in his claim, the court will not grant him interlocutory relief; care must therefore be exercised in drafting the plaintiff's affidavit to see that if the evidence, if accepted at the trial, would entitle him to relief. Another approach would be to see whether to grant an injunction before the trial would be contrary to the public interest and if that happens an injunction will be refused. In *Bestobell Paints v. Bigg* [1975] FSR 421, where the defendant who was aggrieved at the results of painting his house with a particular brand of paint erected a hoarding beside the house advertising that the paint used was provided by the plaintiffs and on these facts the court there held that it will not ordinarily restrain the publication of the alleged libel where the defendant pleads justification. Yet, another approach would be where the relevant facts are not contested and the law is crystal clear, the court can and should grant or refuse relief by deciding whether or not the plaintiff will succeed at the trial. This principle was vigorously applied in the case of *Office Overload Ltd v. Gunn* [1977] FSR 39 CA and in so many other cases where the plaintiff is claiming an injunction to enforce a restrictive covenant.

In *Associated Tractors Sdn Bhd v. Chan Boon Heng & Anor* [1990] 2 MLJ 408 SC, Hashim Yeop A. Sani CJ (Malaya) (as he then was) had this to say:

The discretion of the court in granting or withholding an injunction before the trial of an action is governed by established principle. These principles have been developed over the years and the position in law now is that all the court needs to be satisfied with before exercising the discretion to grant an injunction is that the claim is not frivolous or vexatious. There is no longer a need for the *prima facie* case test. In other words as long as the court is satisfied that there is a serious question to be tried, that will constitute a basis to proceed to consider whether on the balance of convenience the injunction should be granted. See *Hubbard v. Vosper* [1972] 2 QB 84 and *American Cyanamid Co. v. Ethicon Ltd* [1975] AC 396.

Many factors can be relevant for consideration at this stage. It is implied in *Mohamed Zainuddin bin Puteh v. Yap Chee Seng* [1978] 1 MLJ 42 that any factor which can tip the balance may be considered and this is referred to at p. 42:

- a* Firstly to discover whether the plaintiff's case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the court to take into account any tipping in the balance as revealed by affidavits.
- b* Having scrutinised the affidavits of both parties and the documents thereto particularly the statutory declaration and the loan agreement as exhibited by the plaintiff, a serious question to be tried manifested itself from these documents. Though I am not entitled to embark "on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either party's case", yet I have to take into account these two documents together with the injunctive order by the Kuala Lumpur High Court and its dissolution thereof, the cheque in favour of the plaintiff to the tune of RM3,556,000 which represented 50% of the proceeds of the shares of R & I Securities and the sum of RM507,999.50 which was said to be the amount that was overpaid to Bala to come to the conclusion that, indeed there was a serious question to be tried. Next, on the agenda would be for me to consider whether the balance of convenience would be in favour of granting or refusing the interlocutory relief. In considering where the balance of convenience lie, I had to ask this vital question: if the plaintiff succeeds at the trial would she be adequately compensated by damages for any loss caused by the refusal to grant the relief? In my judgment, the answer to this question would be in the negative. From the affidavit of the plaintiff, the company has since been sold to a third party and what the defendant had left was his 4% stake which he planned to hand it over to one of his two sons. The next question to consider would be whether the defendant would be adequately compensated under the plaintiff's undertaking as to damages. In my judgment, the answer would be in the negative bearing in mind and having regard to the fact that there was a failure to show that the plaintiff was indeed worth RM80 million as she claimed to be the measure of the damages incurred by her. The plaintiff must show to this court that she was worth the paper in which it was written.
- g* There was a bare undertaking by the plaintiff as to damages and in the words of Shankar J (now JCA) in *Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors* [1989] MLJ 426: "A bare undertaking as to damages may be "usual" as to form, but useless as to content unless the plaintiffs are worth powder and shot." The plaintiff as the party in pursuit of the injunction must with utmost good faith disclosed all relevant matters for me to weigh in a balance as to whether to grant or otherwise refuse the injunction that was prayed for. From the available evidence, the plaintiff came to court with unclean hands. To begin with and for fear of repetition there were material non-disclosures of the following facts:
- i*

- (1) the company was a Bumiputra enterprise;
- (2) the shares of the company were wholly Bumiputra, and that being the case the shares cannot be transferred to a non-Bumiputra like the plaintiff;
- (3) the plaintiff had been paid RM3,556,000 on 2 March 1992 by the defendant which represented 50% of the proceeds of the shares of the company;
- (4) the involvement of the KLSE; and
- (5) the injunctive order imposed by the Kuala Lumpur High Court and its dissolution thereof.

It would be germane to refer to the decision of Gunn Chit Tuan J (as he then was) in the case of *Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar v. Dato' James Ling Beng King* [1989] 2 MLJ 349 on the question of non-disclosure of material facts. In *Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors* (*supra*), Shankar J (now JCA) was of the view that the non-disclosures and misrepresentation by the plaintiffs there were deliberate or reckless so as to disentitle the plaintiffs to equitable relief. The defendant here took the stand and Mr. P.K. Nathan argued on his behalf that where a permanent injunction cannot be given a *fortiori* a temporary injunction would not be granted. Reliance was placed on the authority of *Bishun Prashad Pathak and others v. Sashi Bhusan Misra and Others* [1923] PATNA 133 where Mullick J had this to say:

Now, the general principle applicable to cases of this kind is that where a permanent injunction cannot be given, no prayer for a temporary injunction will be allowed.

In another part of the same judgment, Mullick J continued in the same vein:

The learned Vakill for the respondents attempted to distinguish the case of the *Jit Lal Singh v. Raja Kamleswari Prasad* (16 Calcutta Law Journal 555), in that case the interim prayer was to restrain a person who had obtained a decree, from executing such decree while a suit was pending for a declaration that the decree had been obtained without jurisdiction and the principle, that an ad interim injunction ought not to be given when permanent relief is not obtainable, was affirmed; this principle is consistent with reason and in the present case, therefore we should comply with it.

Incidentally, the loan agreement which gave the right to the plaintiff to 55% of the defendant's equity in the company was a reflection of the defendant's undertaking to transfer 55% of the equity capital to the plaintiff. At first blush this seems to be legitimately done but also on perusal of r. 4(13)(i) of the

- a* KLSE rules one would be astonished to discover that the prior written approval of the Minister must first be obtained before the plaintiff could have acquired a stake in the company. As a non-member individual the plaintiff shall not be registered as a shareholder of the company without the prior approval of the committee and this impediment is clearly reflected in r. 4(13)(iii) of the
- b* KLSE rules. The statement of claim by way of an alternative prayer sought for, in lieu of damages, specific performance of the loan agreement dated 8 February 1988. The sepcific performance which the plaintiff sought for involved consent of a third party and on the authority of *Witchita Water Co. v. Witchita* 280 Fed. 770; *Burgin v. Sugg* 204 Ala. 270 where the defendant's performance depended on the consent or approval of one not being a party to
- c* the contract who was free to withhold his consent, specific performance of the contract will not be decreed. It follows therefore that where it does not appear that such consent or approval has been or can be obtained (*Bagley v. Bagley* 206 Ala. 232; *Ellis v. Small* 209 Mass. 147; *Lewis v. Bond* 18 Beav. 85) or where it appears that such consent or approval is withheld or refused
- d* (*Musgrove v. Hodge* 46 Kan 764; *Birmingham v. Sheridan* 33 Beav. 660) then the contract has become impossible of performance and specific performance will not be decreed (*Haribat v. Kantzler* 112 Ill. 482; *Hanking v. Anderson* 34 W. Va. 709).
- e* Another aspect of non disclosure was in regard to the failure of the plaintiff to reveal that her role was in fact minimal and that it was her husband – Bala, that played a major role in the scheming and dealing of reviving the company. It is germane to echo the words of Lord Diplock in *American Cyanamid* where his Lordship said that the *American Cyanamid* principles were not meant to be applied rigidly to all cases. This was how his Lordship put it (at p. 511 at column t):
- f*
- I would reiterate that, in addition to these to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.
- g* Thus, where the refusal or the grant of an interlocutory injunction will effectively dispose of the action, the guidelines on the balance of convenience cannot apply as the interlocutory order has the practical effect of adjudicating on the parties' rights without a trial: *Roxy Electric Industries (M) Bhd v. Syarikat Nominee Bumiputra Sdn Bhd* [1989] 3 MLJ 231; *Cayne v. Global National Resources* [1984] 1 All ER 225. In such a situation – like the one presenting itself in the instant case, the principle to apply would be: "What can the court do in its best endeavour to avoid injustice?" (per Everleigh LJ in *Cayne v. Global National Resources* [1984] 1 All ER 225 at p. 232 at line g). The best endeavour to avoid injustice would be to refuse the prayers sought
- i* for in encl. 17 with costs and I so ordered accordingly.

Be that as it may, Mr. Leong Yue Khau had earlier on advanced an argument that this court need only look at the four corners of both the statutory declaration and the loan agreement to conclude that there was a binding contract between the parties. The case of *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1984] 2 MLJ 268 FC was relied and cited upon especially the passages that appeared in the judgment of Seah FJ at p. 270 where his Lordship said:

It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within s. 25 and the action must be brought in the name of the assignee (Mathew LJ in *Hughes v. Pump House Hotel Co. Ltd* [1902] 2 KB 190).

It was further argued that under s. 92 of the Evidence Act, no evidence of any oral agreement or statement shall be admitted to contradict, vary, add to or substract the terms of both the statutory declaration and the loan agreement. On the authority of *Public Finance Bhd v. Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 1 MLJ 495 it was argued that the defendant should know the nature and effect of the statutory declaration which he had signed and, consequently, he must be bound by it. On the question of the creation of a trust, it was argued that in order to establish the existence of an express trust it had to be shown that there had been a clear declaration of trust and in the instant case it was said that both the statutory declaration and the loan agreement were clear examples of the creation of a trust instrument as propounded in the case of *Paul v. Constance* [1977] 1 All ER 195. In encl. 18 at para. 8 the defendant deposed that sometime in 1987 Bala brought some documents to the defendant's house for the defendant's signatures and that included a statutory declaration for the receiver. Bala played a major role in reviving the company and the defendant knew about this and he must have been under the influence of Bala. By way of an analogy would be the case of *Smith v. Kay* [1859] 7 HLC 750, where the facts were that a young man had incurred very extensive debts through association with an older man, who had acquired great influence over him, encouraging him to a course of extravagance. The House of Lords held that the young man was entitled to relief, and Lord Kingsdown observed at p. 779:

- a* The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the court of Equity must ordinarily deals, are those of trustee and *cestui que* trust, and such like. It applies specially to those cases, for this reason and this reason only, that from those relations the court presumes confidence put and influence exerted. Whereas in all other cases where those relations do not subsist, the confidence and the influence must be proved extrinsically; but where they are proved extrinsically, the rules of reason and common sense and the technical rules of a court of Equity, are just as applicable in the one case as in the other.
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- c* It is for this very reason that contracts and settlements of an improvident nature made by poor and ignorant persons, acting without independent advice, have frequently been set aside, unless fair and reasonable (*How v. Weldon* [1754] 2 Ves-Sen 516; *Fry v. Lane* [1888] 40 Ch. D. 312).

- d* I have considered the arguments advanced by Mr. Leong Yue Khau at great length but, unfortunately, I was not persuaded by his rhetoric. The material non-disclosures as adverted to in the early part of this judgment painted a black picture of the plaintiff in such a way as to whittle down her application in encl. 17.

Without hesitation, I dismissed encl. 17 with costs.

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